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No. 452

In the Supreme Court of the United States

OCTOBER TERM, 1929

RICHBOURG MOTOR COMPANY, PETITIONER

v.

THE UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES

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OPINIONS BELOW

No opinion was rendered by the District Court. The per curiam opinion of the Circuit Court of Appeals (R. 18) is reported in 34 F. (2d) 38.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered July 22, 1929. (R. 20.) The petition for certiorari was filed October 21, 1929. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

Where an automobile is seized while being used in the transportation of intoxicating liquor in violation of the National Prohibition Act and there has been no conviction therefor under that Act, may forfeiture proceedings be maintained under Section 3450, Revised Statutes, for use of the car to evade Internal Revenue taxes on the liquor, or does Section 26, Title II, of the National Prohibition Act afford the exclusive remedy for the disposition of the car? In other words, where transportation is involved, are Sections 26 and 3450 in direct conflict so that the former, to the extent of such conflict, repeals the latter?

An incidental question involved is whether the Government is bound by the action of the arresting officer, or whether the prosecuting attorney may elect to proceed under any statute which may have been violated or provides for a forfeiture.

STATUTES INVOLVED

The statutes involved are set forth in an appendix to this brief.

STATEMENT

The automobile in question was seized by a Federal Prohibition Agent while it was being driven along the public highway by a Mrs. Bryson in company with two other persons. It was found to contain twelve and one-eighth gallons of moonshine whiskey on which the tax had not been paid. The

officer testified: "I knew Mrs. Bryson, the girl in the car, and was suspicious of the car. I saw it going down the road and watched for it as it came back. Then I saw it coming back up the road and stopped the car on the main highway and made an investigation and found this liquor in the car." The officer took possession of the car and arrested the occupants, whom he took before a United States Commissioner, where they were charged with transportation and possession of whiskey in violation of the National Prohibition Act. The United States Attorney, however, did not proceed with this charge, but secured an indictment against the occupants of the car under Section 3296, Revised Statutes, for removing and concealing spirits on which the tax was not paid (R. 7), and filed a libel in the District Court for the Western District of North Carolina against the car seeking its forfeiture under Section 3450, Revised Statutes, because it had been used in the removal and for the deposit and concealment of the whiskey in question with intent to defraud the United States of the tax thereon. (R. 1–3.)

The petitioner, the Richbourg Motor Company, intervened in the libel proceedings, claiming the car as an innocent holder of an unsatisfied purchase-money lien thereon for $417, petitioner having sold the car under a conditional sales contract to a Mrs. Hunnicutt who, it appears, had loaned the car to one of the occupants thereof at the time of its seizure. (R. 3–5.)

At the close of all the evidence, the intervenor, Richbourg Motor Company, moved to dismiss the libel on the ground, among others, that the United States had elected to proceed under the National Prohibition Act and was barred from proceeding under Section 3450, Revised Statutes, and on the further ground that, since the prohibition officer had discovered persons in the act of transporting intoxicating liquor, the National Prohibition Act made it mandatory to proceed under that Act. The motion was overruled by the trial court.

The intervenor then tendered the following issue: "Was the Ford Coupe, Motor No. 14,444,150, actually engaged in transporting liquor and were persons in the car and arrested at the time of the seizure of said car?" The court declined to submit this issue to the jury because it was "not raised by the pleadings in the case for the determination of the law question involved."

The court declared there was but one issue, which it submitted to the jury, namely, "Was the Ford Coupe Motor No. 14,444,150 engaged in the removing and concealing of untaxpaid liquor as alleged in the libel?" This issue was answered in the affirmative. (R. 6, 8, 9, 11.)

The court thereupon gave judgment for the forfeiture to the United States of the bond for $350 theretofore given by the Richbourg Motor Company for the release to it of the automobile in question. (R. 10.) On appeal to the Circuit Court of

Appeals the judgment was affirmed in a per curiam opinion. (R. 18, 20.)

ARGUMENT

In *United States* v. *One Ford Coupe,* 272 U. S. 321, it was held, where transportation was not involved, that Section 3450, Revised Statutes, could be applied to forfeit a vehicle used as a place of concealment and deposit of intoxicating liquor for the purpose of evading an internal-revenue tax. In *Port Gardner Investment Company* v. *United States,* 272 U. S. 564, it was held that where transportation was involved and there had been a conviction therefor under the National Prohibition Act, disposition of the car under Section 26 of that Act became mandatory, and resort to proceedings under Section 3450 was precluded. In *Commercial Credit Co.* v. *United States,* 276 U. S. 226, it was held that where there was a conviction of unlawful possession of intoxicating liquor, which possession was incidental to the transportation, the vehicle must be disposed of under Section 26. None of these cases decided the question here involved, namely, whether forfeiture proceedings must be brought under Section 26 where transportation is involved but there has been no conviction under the National Prohibition Act.

In the instant case the car was discovered while being used in the transportation of liquor. There was, however, no conviction under the National

Prohibition Act. While the arresting officer charged the occupants of the car with transportation and possession in violation of that Act, the District Attorney, not feeling himself bound by the action of the arresting officer, elected to proceed against the occupants of the car and the car itself under the internal revenue laws, with the result that the car and the innocent claimant's interests therein were forfeited. This proceeding was approved by the court below, which declared that, where there has been no election to prosecute the guilty parties under the National Prohibition Act, the Government may proceed under Section 3450, and that against such proceedings the rights of an innocent lien claimant will not prevail. In disposing of the case the court referred to its prior opinion in a similar case, *United States* v. *Commercial Credit Co.*, 20 F. (2d) 519, where it said (pp. 520-521):

> There had been no conviction under the National Prohibition Act, as was the case in *Port Gardner Inv. Co.* v. *United States*, 47 S. Ct. 165, 71 L. Ed. —. And an information had not been filed against the guilty parties, as had been done in *Commercial Credit Corporation* v. *United States* (C. C. A. 2d) 18 F. (2d) 927. The question, therefore, is simply whether a proceeding under R. S. Sec. 3450, is barred merely because a prohibition agent has made an arrest and seizure and caused a warrant to be issued charging violation of the National Prohibition Act, and a United

States commissioner has bound over to court the persons so arrested to answer to the charge contained in the warrent. We think that this question must be answered in the negative.

Section 5 of the Act of November 23, 1921, 42 Stat. 222 (Comp. St. Sec. 10138–4/5c), under which the old internal revenue laws with respect to intoxicating liquors are retained in force, provides that " if any act is a violation of any of such laws and also of the National Prohibition Act or of this act, a conviction for such act or offense under one shall be a bar to prosecution therefor under the other." It will thus be seen that it is a conviction, and not a prosecution, under one act, which is a bar to a prosecution under the other; and, while we do not pass upon the question as to whether the filing of an information under the National Prohibition Act would constitute such an election of remedies as would bar a proceeding under R. S. Sec. 3450, it seems perfectly clear that the government is not precluded from proceeding under R. S. Sec. 3450, by a seizure made by a prohibition officer, or papers issued by a United States commissioner in advance of any action by the United States attorney. In such case there is no election by prosecution under the Prohibition Act; for the prosecution is not commenced until an indictment is found or information filed. * * *

* * * * *

The United States attorney is the law officer authorized to speak in behalf of the government. It would greatly hamper him in

the performance of his duties to be bound by the conclusions of prohibition agents and United States commissioners. Let a case be supposed where a seizure has been made and a warrant issued under the National Prohibition Act, but where the parties charged are not guilty of violating that act, but are guilty of a violation of the internal revenue laws and have incurred a forfeiture thereunder. Is the district attorney in such case to be precluded from proceeding with a proper prosecution, and are the guilty parties to escape, because of the mistaken action of the prohibition agent and the commissioner? Or in case the act complained of constitutes a violation of both the revenue laws and the Prohibition Act, and a warrant is issued under the latter, but it becomes impossible to secure a conviction thereunder because of the escape of the guilty party, are the hands of the government to be tied, so that it cannot proceed to enforce the forfeiture against the property incurred by violation of the revenue laws, merely because a prohibition agent has secured a warrant under the Prohibition Act? To ask these questions is to answer them; and to our minds they demonstrate the unsoundness of the suggestion that, by action of a prohibition agent or a United States commissioner, the government is to be held to have made an election of remedies, and is to be precluded from prosecuting crimes denounced by its laws or forfeitures incurred thereunder. The fact that the statute directs that, upon

an arrest and seizure under the Prohibition Act, the officer of the law shall proceed against the person arrested, in a court of competent jurisdiction, manifestly was not intended to preclude a prosecution for other crimes of which the person arrested might be guilty, or to make such action by the officer an election by the government to proceed under the Prohibition Act instead of under the internal revenue laws, if the act of which accused was guilty constituted a violation of both.

On the other hand, the Circuit Court of Appeals for the Fifth Circuit, in *United States* v. *General Motors Acceptance Corporation,* 25 F. (2d) 238, held that where a person is discovered in the act of transporting liquor in a vehicle in violation of the National Prohibition Act, Section 26 makes it mandatory upon the Government to proceed against the person and the vehicle as therein provided and there is no authority of law to forfeit the vehicle under Section 3450. The court said (p. 239):

> Assuming that it is possible to prove that one who uses a vehicle in the removal or for the deposit or concealment of untax-paid liquor has the necessary intent under section 3450 to defraud the United States of a tax which existing law neither requires nor permits to be paid, it is nevertheless true that, if a person be caught in the act of unlawfully transporting liquor in a vehicle, there is no authority of law to proceed under section 3450, either to prosecute the person or

to forfeit the vehicle. Under such circumstances it is apparently recognized in *United States* v. *One Ford Coupe, supra,* that section 26 is exclusively applicable. In that case it was said that there was no allegation that the automobile had been discovered or was being used in unlawful transportation, or that the driver had been prosecuted. Here there was proof or admission that the driver was discovered by the arresting officers in the act of illegal transportation of liquor in the automobile sought to be forfeited.

After referring to this Court's decisions in the *Port Gardner* and *Commercial Credit Company cases, supra,* the court proceeded (p. 240):

> It is apparent from these recent decisions that the Supreme Court has not passed upon a case in all respects like the one before us. The record in this case, either designedly or by unintentional omission, fails to disclose whether Girdner was tried, either under the Internal Revenue Law or under the National Prohibition Act. But in our opinion the proceedings taken after the arrest and seizure are immaterial, as it was the duty of the government under the plain terms of section 26 to prosecute him for unlawful possession or transportation.

See also *United States* v. *Milstone* (C. A. D. C.), 6 F. (2d) 481; *United States* v. *One Dodge Sedan* (Utah), 21 F. (2d) 971.

In the *Ford Coupe case, supra,* this Court held that there was no direct conflict between Sections

26 and 3450, so that the former repealed the latter, at least where no transportation was shown, and we submit that no conflict results where transportation is involved. We do not believe that Congress intended, merely because transportation is disclosed, to deprive the Government of the use of any law which would ordinarily be available to it in the enforcement of the liquor as well as other statutes, such as internal revenue, customs and navigation. The argument that the two sections are in direct conflict when transportation occurs, and that the Government has no choice but must proceed under Section 26, is based largely upon the alleged mandatory character of Section 26 resulting from the use of the word "shall" in the section. The word "shall" has frequently been construed as meaning "may" when used in other statutes, and we submit it should be so construed here. If Section 26 is not construed as mandatory and therefore exclusive, the argument that a conflict exists loses its force. A provision in one statute authorizing forfeiture of guilty interests in a car used for illegal transportation is not in direct conflict with another statute providing that the whole value of the vehicle may be forfeited if used in violation of the revenue, customs or navigation laws.

The construction of Section 26 as compulsory and exclusive in all cases where transportation is involved because of the use of the word "shall" would result in consequences which could hardly have been intended. For example, if the driver of a vehicle

used to transport liquor illegally escapes, or if witnesses die or fail to identify him, no forfeiture of the car can result, because under Section 26 conviction of the individual must first be had. Section 3450 or any other statute under which the vehicle might be forfeited can not be invoked. If a vehicle is used to conceal liquor on which the tax is unpaid, complete forfeiture may be had; but if to the offense of tax evasion is added the offense of transportation without a permit, a less severe forfeiture results. Where a vehicle is used to smuggle intoxicating liquor, and is seized while transporting such liquor across an international border, it may be forfeited only under Section 26, although the offense of smuggling, entailing a complete forfeiture, has been simultaneously committed. Again, if a vehicle carries both liquor and smuggled merchandise, it is used in transporting liquor in violation of the National Prohibition Act and in smuggling merchandise, and yet Section 26 must be resorted to rather than the statutes incurring a greater forfeiture. So, a vehicle seized while being used in smuggling narcotics or diamonds may be completely forfeited, but if used in smuggling liquor so that transportation results, innocent interests must be protected. In short, where a vehicle or vessel is used in the illegal transportation of liquor, the Government is precluded from securing a forfeiture not only under Section 3450 for tax evasion, but under any other statute imposing a forfeiture for some other simultaneous offense, such as under the customs or navi-

gation laws, where the interests of innocent encumbrancers are not saved.

If by reason of the language used, proceedings under Section 26 are held to be mandatory and exclusive in all transportation cases, there is of course no election. Section 26 should not be so construed, but it should be left open to the Government to proceed under any of the above statutes, if not under all, where distinct offenses under each are disclosed. Moreover, we submit that the right of election should be with the prosecuting attorney, as held by the court below, and he should not be bound by the action of the arresting officers. He is responsible for and has charge of ultimate prosecutions. *The Jugoslavia,* 21 F. (2d) 99.

It is settled that the disposition of the vehicle prescribed in Section 26 becomes mandatory upon a conviction for transportation, or for possession incidental to transportation, and resort to forfeiture under Section 3450 can not be had. At what stage of the proceedings short of conviction the prosecuting officer may elect under which statute he will proceed has not been definitely decided. In the *Port Gardner case, supra,* this Court found it unnecessary to determine whether the mere commencement of a proceeding under Section 26 constitutes an election, but a prosecution resulting in a plea of guilty was construed as a "prosecution with effect" and as resulting in an election. In *Commercial Credit Corporation* v. *United States* (C. C. A. 2d), 18 F. (2d) 927, it

was held that the filing of an information constituted an election. Under Section 26 it is the conviction of the person arrested that determines the disposition of the vehicle. Likewise, Section 5 of the Act Supplemental to the National Prohibition Act takes no account of the mere commencement of a proceeding, but provides that, as to offenses which constitute a violation of the liquor laws in force before the National Prohibition Act as well as of that Act or the Supplemental Act, only a conviction under one statute shall bar a prosecution under the other.

CONCLUSION

Notwithstanding these considerations, in view of the conflict of decisions involved, and because the questions presented are constantly arising in the enforcing of prohibition, the Government does not oppose the petition.

Respectfully submitted.

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NOVEMBER, 1929.

APPENDIX

For the convenience of the Court the following statutes are set forth below:

Section 26, Title II, of the National Prohibition Act, c. 85, 41 Stat. 305, 315 (U. S. C., Title 27, Sec. 40):

> When the commissioner, his assistants, inspectors, or any officer of the law shall discover any person in the act of transporting in violation of the law, intoxicating liquors in any wagon, buggy, automobile, water or aircraft, or other vehicle, it shall be his duty to seize any and all intoxicating liquors found therein being transported contrary to law. Whenever intoxicating liquors transported or possessed illegally shall be seized by an officer he shall take possession of the vehicle and team or automobile, boat, air or water craft, or any other conveyance, and shall arrest any person in charge thereof. Such officer shall at once proceed against the person arrested under the provisions of this title in any court having competent jurisdiction; but the said vehicle or conveyance shall be returned to the owner upon execution by him of a good and valid bond, with sufficient sureties, in a sum double the value of the property, which said bond shall be approved

by said officer and shall be conditioned to return said property to the custody of said officer on the day of trial to abide the judgment of the court. The court upon conviction of the person so arrested shall order the liquor destroyed, and unless good cause to the contrary is shown by the owner, shall order a sale by public auction of the property seized, and the officer making the sale, after deducting the expenses of keeping the property, the fee for the seizure, and the cost of the sale, shall pay all liens, according to their priorities, which are established, by intervention or otherwise at said hearing or in other proceeding brought for said purpose, as being bona fide and as having been created without the lienor having any notice that the carrying vehicle was being used or was to be used for illegal transportation of liquor, and shall pay the balance of the proceeds into the Treasury of the United States as miscellaneous receipts. All liens against property sold under the provisions of this section shall be transferred from the property to the proceeds of the sale of the property. If, however, no one shall be found claiming the team, vehicle, water or aircraft, or automobile, the taking of the same, with a description thereof, shall be advertised in some newspaper published in the city or county where taken or if there be no newspaper published in such city or county, in a newspaper having circulation in the county, once a week for two weeks and by handbills

posted in three public places near the place of seizure, and if no claimant shall appear within ten days after the last publication of the advertisement, the property shall be sold and the proceeds after deducting the expenses and costs shall be paid into the Treasury of the United States as miscellaneous receipts.

Sec. 35, p. 317 (U. S. C., Title 27, Sec. 52):

All provisions of law that are inconsistent with this Act are repealed only to the extent of such inconsistency and the regulations herein provided for the manufacture or traffic in intoxicating liquor shall be construed as in addition to existing laws. This Act shall not relieve anyone from paying any taxes or other charges imposed upon the manufacture or traffic in such liquor. No liquor revenue stamps or tax receipts for any illegal manufacture or sale shall be issued in advance, but upon evidence of such illegal manufacture or sale a tax shall be assessed against, and collected from, the person responsible for such illegal manufacture or sale in double the amount now provided by law, with an additional penalty of $500 on retail dealers and $1,000 on manufacturers. The payment of such tax or penalty shall give no right to engage in the manufacture or sale of such liquor, or relieve anyone from criminal liability, nor shall this Act relieve any person from any liability, civil or criminal, heretofore or hereafter incurred under existing laws.

* * * * * *

Section 5 of the Supplemental Act of November 23, 1921, c. 134, 42 Stat. 222, 223 (U. S. C., Title 27, Sec. 3):

> That all laws in regard to the manufacture and taxation of and traffic in intoxicating liquor, and all penalties for violations of such laws that were in force when the National Prohibition Act was enacted, shall be and continue in force, as to both beverage and nonbeverage liquor, except such provisions of such laws as are directly in conflict with any provision of the National Prohibition Act or of this Act; but if any act is a violation of any of such laws and also of the National Prohibition Act or of this Act, a conviction for such act or offense under one shall be a bar to prosecution therefor under the other. * * *

Section 3450 of the Revised Statutes (U. S. C., Title 26, Sec. 1181):

> Whenever any goods or commodities for or in respect whereof any tax is or shall be imposed, or any materials, utensils, or vessels proper or intended to be made use of for or in the making of such goods or commodities are removed, or are deposited or concealed in any place, with intent to defraud the United States of such tax, or any part thereof, all such goods and commodities, and all such materials, utensils, and vessels, respectively, shall be forfeited; and in every such case all the casks, vessels, cases, or other packages whatsoever, containing, or which shall have contained, such goods or

commodities, respectively, and every vessel, boat, cart, carriage, or other conveyance whatsoever, and all horses or other animals, and all things used in the removal or for the deposit or concealment thereof, respectively, shall be forfeited. And every person who removes, deposits, or conceals, or is concerned in removing, depositing, or concealing any goods or commodities for or in respect whereof any tax is or shall be imposed, with intent to defraud the United States of such tax or any part thereof, shall be liable to a fine or penalty of not more than five hundred dollars. And all boilers, stills, or other vessels, tools and implements, used in distilling or rectifying, and forfeited under any of the provisions of this Title, and all condemned material, together with any engine or other machinery connected therewith, and all empty barrels, and all grain or other material suitable for distillation, shall, under the direction of the court in which the forfeiture is recovered, be sold at public auction, and the proceeds thereof, after deducting the expenses of sale, shall be disposed of according to law. And all spirits or spirituous liquors which may be forfeited under the provisions of this Title, unless herein otherwise provided, shall be disposed of by the Commissioner of Internal Revenue as the Secretary of the Treasury may direct.

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